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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. [redacted] 271

CASSIUS MARSELLUS CLAY, JR., also known as MUHAMMAD ALI, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITIONER'S REPLY TO SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

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UNITED STATES OF AMERICA, *Respondent.*

PETITIONER'S REPLY TO SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

The Solicitor General, after the filing of the brief for the United States in opposition to the granting of the Petition for Certiorari, filed a Supplemental Memorandum disclosing for the first time that on five occasions petitioner participated in conversations which were monitored by electronic surveillance. The following, however, was not disclosed:

(a) The persons participating in the conversations;

(b) The dates and times (except for the months and years) of the conversations;

(c) The places of the surveillance;

(d) The duration of the surveillance;

(e) The persons or agencies conducting the surveillance;

(f) The persons or agencies who had access to the information obtained by the surveillance;

(g) The purpose of the surveillance;[1]

(h) The uses to which the information was put; and

(i) The substance of the contents, the recordings made, and the texts of any surveillance logs or memoranda.

Petitioner accordingly seeks disclosure of all of the foregoing,[2] prior to determining whether or not to move for a remand and hearing.

The Solicitor General recognizes that normally the proper procedure would be to remand the case to the District Court for further proceedings but asks that this course not be followed because "this case presents a peculiar fact situation . . . ." Supplemental Memorandum 2. The assertion that this Court can determine by an examination of the record alone that "petitioner's

[1] Except that in one instance "the overhearing occurred in the course of the gathering of foreign intelligence information." Supplemental Memorandum 2. See Brief for Petitioners in Ivanov v. United States, October Term 1968 No. 11.

[2] *Cf.* Hoffa v. United States, 387 U.S. 231, 232 (1967) which indicates that the Solicitor General's sua sponte disclosure is normally more complete; *e.g.*, there he at least listed the exact date of one conversation, the persons involved, the federal agency involved, the date of installation of the surveillance device, the subject of the conversation, and the extent of availability of the information to the prosecution.

conversations could not possibly have had any effect on the prosecution," *id.*, cannot be accepted; but petitioner does agree that "a peculiar fact situation" exists which may require determination by this Court rather than a remand. Before these proceedings petitioner's income was derived from boxing. When indicted for failure to submit to induction he was stripped of his heavyweight title which deprived him of this means of livelihood. The athlete has but a few years during which his earning capacity is viable; the permanent effect and injury to property rights, to the very ability to earn a living, caused by these criminal proceedings is more crucial than that suffered by most persons. See opinion below, Appendix to Petition for Certiorari 35a n. 13. To remand the case to the District Court and perhaps again have it wend its way through the appeals process could effect by lapse of time an irreparable injury to petitioner.

Accordingly, petitioner prays that full disclosure be made in this Court. Petitioner's counsel cannot now determine whether to seek a disposition of the matter here, as suggested by the Solicitor General, or to seek a remand for a factual hearing.

Otherwise further disclosures may come from the Government piecemeal, further delaying a final adjudication of petitioner's rights. For example, on the remand of *Hoffa* v. *United States, supra,* 3 Cr. L. 2457 (No. 16,634, 7th Cir., Aug. 15, 1968) eavesdropping upon the attorneys was not disclosed until oral argument in the court of appeals. And in *Kolod* v. *United States,* 390 U.S. 136 (1968), *vacating and remanding* 371 F. 2d 983 (10th Cir. 1967) the Tenth Circuit's opinion shows that the fruits of electronic surveillance

had been at issue at the trial; then prior to appellate argument "counsel for the government advised this court that he had learned for the first time of the existence of additional files . . .", 371 F. 2d at 988, and a limited remand was ordered. Then, as shown by the opinion of this Court on rehearing, the defendants' counsel learned after the petition for certiorari was filed that still more electronic surveillance had taken place, necessitating yet another round of hearings (except for defendant Kolod, who by then had died).

The record in this case presumptively establishes the relevance of the information gained by the electronic surveillance.

First, the primary thrust of the Solicitor General's assertion of irrelevance is a recital of facts that show that petitioner was in fact entitled to be classified as a conscientious objector. This merely strengthens the suspicion (heightened by the abnormally limited nature of the disclosure) that there may have been something else that caused the Department of Justice or the various elements of the Selective Service System to refuse to grant him this classification.[3]

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[3] The Supplemental Memorandum pays lip service to, but effectively denies, the principle that, at the very least, an *in camera* judicial inspection of the fruits of the surveillance is essential to due process; here there is in fact that "*ex parte* determination of relevancy" found unacceptable in Kolod v. United States, *supra*, 88 S. Ct. at 753. That even *in camera* inspection is insufficient, particularly where, as here, considerations of national security are not asserted, see Baker v. United States, 3 Cr. L. 2460 (No. 21,154 D.C. Cir., Aug. 9, 1968): "[T]he Court's *in camera* examination of the logs, however diligent and careful, was hardly an adequate substitute, in these circumstances, for an adversary proceeding." *Id.*, slip opinion at 45.

Page 3 of the Supplemental Memorandum may give a clue as to the nature of the information produced by the surveillance: "The evidence that petitioner was not entitled to such exemptions came from examination of the tenets of his religion, as found in the published works of its leaders, and from his own statements . . . ." The source of this "evidence"[4] may perhaps more accurately be said to be the Department of Justice's advice to the Selective Service System that "the teachings of the Nation of Islam, rest on grounds which primarily are political and racial. These constitute objections to only certain types of war in certain circumstances, rather than a general scruple against participation in war in any form." Petitioner's Selective Service File 220 (Govt. Exh. 1; see Petition for Certiorari 16-17). The genesis of this assertion may well have been the surveillance, perhaps the conversation "overheard in the course of the gathering of foreign intelligence information." Supplemental Memorandum 2. Since the surveillance was "directed against others," *Id.*, this sort of information would not necessarily have come from petitioner's conversations. Accordingly any disclosure order should require the production not only of the records of petitioner's over-

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[4] Except for the mass of newspaper clippings in defendant's selective service file, the only "published work" referred to by the court of appeals to show "the tenets of his religion" is the opinion in Sostre v. McGinnes, 334 F. 2d 906, 909 (2d Cir.) *cert. denied*, 375 U.S. 892 (1964). See Appendix to the Petition for Certiorari 35a-40a. Published works are contained in the Record. Parenthetically it should be noted that, while the lengthy quotation, *Id.* at 37a-38a, from that case might, if true (Sostre was of course not a matter of evidence herein), have been offensive to the court, there is nothing in it on which to base the denial of petitioner's claimed conscientious objection.

heard conversations, but also those of the leaders of the Lost Found Nation of Islam and "others"; this should be well within the purview of Fed. R. Cr. P. 16(b).

Third, the Supplemental Memorandum, as does the Solicitor General's Brief in Opposition, ignores petitioner's extensive efforts to secure pre-trial discovery under the liberalized Federal Rule of Criminal Procedure 16(b). Here too is additional ground for keeping the matter before this court at least until full disclosure has been made; the district court, as affirmed by the court of appeals, steadfastly frustrated petitioner's every effort to discover materials having a bearing on the Selective Service System's denial to petitioner of I-O and IV-D classifications. See Petition for Certiorari 3 (Questions Presented numbered 2c and 4), 9, 14-15, and Appendix thereto 24a-28a. Since the District Court and Court of Appeals agreed that discovery could produce nothing of relevance, a simple remand leaving the determination of relevance to the district court would be of doubtful value to petitioner until the case again reaches this Court and is perhaps again remanded, practically abolishing the remainder of petitioner's economically productive life.

CONCLUSION

Petitioner respectfully requests that the Solicitor General be required to make full disclosure of all matters involved herein (a) prior to requiring petitioner to make a determination as to whether or not to move for a remand herein, and (b) prior to remand by this Court *ex mero motu.*

Respectfully submitted,

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